



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 19, 2003

Ms. Jennifer Soldano
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2003-9227

Dear Ms. Jennifer Soldano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 193235.

The Texas Department of Transportation (the "department") received a request for information relating to the IH-35 High Priority Transportation Corridor, including the executive summaries and any supporting documents. You claim that some of the requested information is excepted from disclosure under section 552.101 of the Government Code. You also believe that this request for information implicates the proprietary interests of three private parties to whom the information pertains. You notified Cintra, Concesiones de Infraestructuras de Transporte, S.A. ("Cintra"); Fluor Corporation ("Fluor"); and Trans Texas Express L.L.C. ("TTEX") of this request for information and of their right to submit arguments to this office as to why information pertaining to Cintra, Fluor, and TTEX should not be released.¹ You also submitted a representative sample of the requested information. We also received correspondence from Fluor and TTEX. We have considered all of the submitted arguments and have reviewed the information you submitted.²

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Gov't Code ch. 552 in certain circumstances).

²This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the department to withhold any information that is substantially different from the submitted information. See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

We first note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, we have received no arguments from Cintra. Thus, Cintra has not demonstrated that any of the submitted information is proprietary for purposes of section 552.110 of the Government Code. *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

We next note that the public availability of some of the requested information is the subject of a prior open records letter ruling. In Open Records Letter No. 2003-8734 (2003), we addressed information relating to the Trans Texas Corridor and Cintra, Fluor, and TTEX. We concluded that the department must withhold some of that information under section 552.101 of the Government Code in conjunction with section 361.3023 of the Transportation Code. You do not inform us, and we are not otherwise aware, of any change in the law, facts, or circumstances on which the prior ruling is based. Therefore, to the extent that Open Records Letter No. 2003-8734 (2003) encompasses the information that is responsive to the present request, the department must withhold or release that information in accordance with the prior ruling. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (attorney general decision constitutes first type of previous determination under Gov't Code § 552.301(a) when (1) precisely same records or information previously were submitted under Gov't Code § 552.301(e)(1)(D); (2) same governmental body previously requested and received ruling; (3) prior ruling concluded that same records or information are or are not excepted from disclosure; and (4) law, facts, and circumstances on which prior ruling was based have not changed).

To the extent that our prior ruling does not encompass the submitted information, we address the department's claim under section 552.101 of the Government Code. Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that another statute makes confidential. You raise section 552.101 in conjunction with section 361.3023 of the Transportation Code, which provides as follows:

(a) To encourage private entities to submit proposals under Section 361.3022 [of the Transportation Code], the following information is confidential, is not subject to disclosure, inspection, or copying under Chapter 552, Government Code, and is not subject to disclosure, discovery, subpoena, or other means of legal compulsion for its release until a final contract for a proposed project is entered into:

- (1) all or part of a proposal that is submitted by a private entity for a comprehensive development agreement, except information provided under Section 361.3022(b)(1) and (2);

(2) supplemental information or material submitted by a private entity in connection with a proposal for a comprehensive development agreement; and

(3) information created or collected by the department or its agent during consideration of a proposal for a comprehensive development agreement.

(b) After the department completes its final ranking of proposals under Section 361.3022(h), the final rankings of each proposal under each of the published criteria are not confidential.

Act of June 1, 2003, 78th Leg., R.S., ch. 1325, § 15.58, 2003 Tex. Sess. Law Serv. 4884, 4971-72 (Vernon) (to be codified at Transp. Code § 361.3023). Section 361.3022(b)(1) and (2) provide as follows:

(b) The department shall establish rules and procedures for accepting unsolicited proposals that require the private entity to include in the proposal:

(1) information regarding the proposed project location, scope, and limits; [and]

(2) information regarding the private entity's qualifications, experience, technical competence, and capability to develop the project[.]

Id. at 4970 (to be codified at Transp. Code § 361.3022). Section 361.302 of the Transportation Code defines a "comprehensive development agreement" as "an agreement with a private entity that, at a minimum, provides for the design and construction of a turnpike project and may also provide for the financing, acquisition, maintenance, or operation of a turnpike project." Act of June 1, 2003, 78th Leg., R.S., ch. 1325, § 15.57, 2003 Tex. Sess. Law Serv. 4884, 4969-70 (Vernon) (to be codified as an amendment to Transp. Code § 361.302).

You indicate that the submitted information relates to proposals regarding a comprehensive development agreement. You have marked the portions of this information that you assert are not subject to section 361.3022(b)(1) and (2) of the Transportation Code. You do not inform us that the department has awarded a contract for the proposed project to which the submitted information relates. Based on your representations and our review of the submitted information, we conclude that to the extent that the marked information is not encompassed by Open Records Letter No. 2003-8734 (2003), that information must be withheld from disclosure at this time under section 552.101 of the Government Code in conjunction with section 361.3023.

With regard to the submitted information that is not encompassed by Open Records Letter No. 2003-8734 (2003) or made confidential under section 361.3023 of the Transportation Code, we address the correspondence that we received from Fluor and TTEX. Both Fluor and TTEX have submitted arguments under section 552.110 of the Government Code. This section protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (2) “commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” See Gov’t Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the “trade secrets” component of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no

one submits an argument that rebuts the claim as a matter of law.³ *See* Open Records Decision No. 552 at 5 (1990).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See also* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Fluor and TTEX do not object to the release of their respective executive summaries. Both Fluor and TTEX contend, however, that other information that the parties submitted to the department is excepted from disclosure under section 552.110.⁴ Having considered the parties' arguments, we find that neither Fluor nor TTEX has demonstrated that any of the remaining information that the department has submitted qualifies as a trade secret or that the release of any of that information would be likely to cause Fluor or TTEX any substantial competitive harm. We therefore conclude that none of the remaining information is excepted from disclosure under section 552.110. *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

In summary: (1) any responsive information encompassed by Open Records Letter No. 2003-8734 (2003) must be withheld or released in accordance with the prior ruling; and

³The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

⁴We note that the private parties' arguments appear to encompass information that the department has not submitted to this office in requesting this decision. This decision is applicable only to the submitted representative sample information. *See* Gov't Code § 552.301(e)(1)(D).

(2) the submitted information not encompassed by the prior ruling that is confidential under section 361.3023 of the Transportation Code must be withheld from disclosure under section 552.101 of the Government Code. The rest of the submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

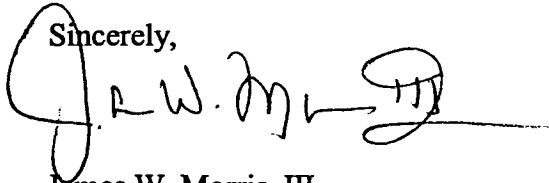
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 193235

Enc: Submitted documents

c: Ms. Peggy Fikac
San Antonio Express-News
1005 Congress, Suite 430
Austin, Texas 78701
(w/o enclosures)

Mr. Fernando Redondo
Cintra, Concesiones de Infraestructuras de Transporte, S.A.
Pza. Manuel Gomez Moreno, 2
Edificio Alfredo Mahou
E-28020 Madrid
(w/o enclosures)

Mr. Dan R. Stoppenhagen
Fluor Enterprises, Inc.
8108 Mesa Drive, Suite C101
Austin, Texas 78759
(w/o enclosures)

Mr. John LaRue
Trans Texas Express
1820 Regal Row, Suite 250
Dallas, Texas 75235
(w/o enclosures)